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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VIOLETTA SPEARS,

Plaintiff and Appellant,

v.

WALGREENS, INC. et al,

Defendants and Respondents.

E046320

(Super.Ct.No. INC031859)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas P. Miller and Gary B. Tranbarger, Judges.¹ Affirmed.

Law Offices of Joseph Amato and Joseph Amato for Plaintiff and Appellant.

Keller, Price & Moorhead and Jeffrey C. Sparks for Defendant and Respondent Walgreen Co.

Paul J. Shardlow for Defendant and Respondent Steven Berchenko.

¹ Judge Miller denied plaintiff's motion for leave to amend her complaint, and Judge Tranbarger presided over the trial.

I. INTRODUCTION

Plaintiff Violetta Spears appeals from judgment following a jury verdict in favor of defendants Walgreens, Inc. and Steven Berchenko. Spears contends the trial court erred in (1) bifurcating the issues of liability and damages and excluding evidence of damages in the liability phase; (2) its instructions to the jury on false imprisonment; (3) denying her motion for leave to amend her complaint to add a cause of action for sexual harassment; and (4) various rulings on motions in limine. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

Spears filed a complaint against defendants alleging false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. (The original complaint is not included in the record on appeal.) She later moved for leave to amend her complaint to allege a cause of action for assault. The trial court denied the motion. Defendants moved for summary judgment, which the trial court granted. In a prior appeal (*Spears v. Walgreens, Inc., et al.* (Apr. 19, 2005, E035083) [nonpub. opn.]), this court affirmed the denial of the motion for leave to amend the complaint. However, we reversed the order granting summary judgment as to the cause of action for false imprisonment only.

Following remand to the trial court, Spears moved to amend her complaint to add a cause of action for sexual harassment. The trial court denied the motion on the ground the issue had been disposed of in our opinion in the previous appeal.

At trial, Spears testified she had been employed as a pharmacy technician at a Walgreens drug store in Indio for about two years when Berchenko became her supervisor in November 2001. For the first few weeks, there were no problems in their relationship, but he began yelling at her because she did not introduce him to cute customers. On one occasion in late December 2001, he became angry because he could not find a prescription, and he stated that if he ever found who had misfiled the prescription, he would “shoot that person.”

On December 28, 2001, Berchenko yelled at Spears because he could not find another prescription, and Spears started crying. Spears went into the bathroom to try to regain her composure. When she left the bathroom, it was time for her to go home, and she started to say goodbye to her coworkers. Berchenko opened the bathroom door and indicated for her to go inside. She asked if they could talk the next day, but he said no. She was frightened and complied with his demand. Once they were inside the bathroom, he closed the door and started yelling. The bathroom was 10 or 12 feet square. Spears testified Berchenko stood in front of the door three to six feet away from her. He was yelling, and his hands were moving up and down. Spears testified she begged him five or six times to let her go, but he continued to stand by the door. Finally, Berchenko opened the door, and she left. At trial, she testified they had been in the bathroom 20 to 30 minutes. In her deposition, she had said 10 to 20 minutes. She testified she feared for her life in the bathroom.

Spears testified she had cried all night following the bathroom incident and had gone to urgent care the next morning. As a result of the bathroom incident, she

developed flu-like symptoms and anxiety symptoms. She continued to cry all that day and could not sleep the next night. She returned to the hospital the next morning and received a prescription for Paxil for her anxiety. She was also told to visit her regular doctor, which she did.

Spears's husband and mother-in-law testified about Spears's distraught condition and physical symptoms following the bathroom incident.

Berchenko testified that he became the pharmacy manager at the Indio Walgreens drugstore on November 15, 2001. Spears constantly asked to leave work early, and she failed to complete her duties. He had to reprimand her several times. On December 27, he had reprimanded her for misfiling a prescription. He denied saying anything about shooting anyone. The next day, Spears again misfiled a prescription, and he again reprimanded her. She left the work area, and another employee said she was in the bathroom crying. When she came out of the bathroom, he asked her to go back inside with him so he could talk to her and calm her down. He chose the bathroom only so they could have privacy and because, as the pharmacist, he could not leave the pharmacy area. Inside the bathroom, he told her to calm down and then go home and regroup. His intention was to give her a pep talk and bring her spirits up. Berchenko believed she was closer to the door than he was; he never touched her or threatened her in any way in the bathroom, and he had not blocked her from leaving. When she left, she seemed calm and relaxed. The conversation in the bathroom did not last very long.

Angela Noyola, who had been working as a pharmacy technician at Walgreens on the date of the bathroom incident, testified that she had been working at the counter when

she noticed Spears and Berchenko were no longer present. She went near the door of the bathroom, which was five to seven feet away, and heard Spears yelling or talking loudly, saying that she loved Berchenko, that none of the other pharmacy employees cared about him, she was the only one who cared about him, and that everyone else hated him.

Berchenko was back at the pharmacy counter one or two minutes later, but Noyola did not see Spears again that day. Noyola testified that Berchenko could not have been gone from the pharmacy counter for more than a few minutes; they were not allowed to sell new prescriptions unless the pharmacist was available for counseling, and if the pharmacist had been gone 20 or 30 minutes, it would have been “pretty much chaos” because they would have been “backed up to [their] eyeballs” at that time of day.

Walgreens’s loss prevention supervisor, Alberto Gonzales, testified he had interviewed Spears on January 3, 2002, about the incident. Spears had told him that on December 28, 2001, Berchenko had yelled at her, and she had become upset and had asked to go home. Berchenko took her into the bathroom and continued to yell at her for about five minutes.

Following trial, the jury found by special verdict that Berchenko had not falsely imprisoned Spears. Judgment was thereafter entered in favor of defendants.

III. DISCUSSION

A. Bifurcation of Liability and Damages Issues

Spears contends the trial court’s order bifurcating trial of liability and damages issues, and its related ruling that she could not introduce evidence of emotional distress in

the liability phase, prevented her from establishing an element of her cause of action for false imprisonment.

1. Additional Background

Defendants moved in limine to preclude Spears from presenting evidence of emotional distress. Over Spears's objection, the trial court ruled that it would bifurcate the issues of liability and damages and would therefore preclude evidence of emotional distress in the liability phase of the trial. The trial court clarified its ruling: "In the course of our discussion yesterday, I indicated that with the exception of psychiatrists from each side, which I would not permit to testify at phase one, I would permit a certain wide latitude to present damage type evidence in phase one if the side so chooses." In response to Spears's counsel's question, the trial court confirmed it would allow evidence of "all the times [Spears] went to the psychiatrist, which numbers 50 times that she went to the doctor, that she went to the emergency."

2. Standard of Review

It is within the discretion of the trial court to order bifurcation of issues (*Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 205), and we review the trial court's ruling only for abuse of that discretion (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086). We review the trial court's rulings on the admission or exclusion of evidence using the same abuse of discretion standard. (See *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 172, 175.)

3. Analysis

We find no abuse of discretion in the trial court's evidentiary ruling. Moreover, even if we found error, any error in admitting or excluding evidence warrants reversal only if the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.) Here, although Spears contends she was precluded from offering evidence of her emotional distress, in fact, she presented extensive evidence on that issue. Spears testified she was "emotionally distraught" as a result of the bathroom incident and continued to experience fear. When she got home, she cried continually and could not eat or sleep until she went to the emergency room the next morning. She testified that as a result of the bathroom incident, she developed "a flu-like symptom when I get anxiety and pains all over my body," and she coughed. The doctor wanted to give her an injection to treat her anxiety, but she declined. When she got home, she still could not stop crying and could not sleep that night. She returned to the emergency room the next day and saw the same doctor, who prescribed Paxil to treat her anxiety and nervousness. The emergency room doctor told her to see her regular doctor, which she did within a day or two.

Spears's mother-in-law, Min Landau, testified that on the evening of the bathroom incident, Spears had been hysterical and almost incoherent. Landau spent about an hour with Spears to try to calm her, but Spears went home "in a very bad state, very bad state." For the next month or so, Spears "cried all the time, just all the time. She was . . . really terrified, really terrified." Landau testified that the incident still haunted Spears.

Spears testified she tried to return to work a few days after the incident, but she left to go to her doctor, who referred her to a psychiatrist. She took medication for anxiety for over a year. She testified that she had not worked for a whole year while she was under a doctor's care.

Spears's counsel argued to the jury that it had "heard an abundance of evidence" regarding the harm that the bathroom incident had caused. "She went to emergency care. She went to a psychiatrist for 50 different times. And she went to her own doctor and she went there because of what happened in that bathroom."

Because the jury had before it abundant evidence on the issue of emotional distress, it is unlikely the additional evidence of a psychiatrist would have resulted in a different verdict in the liability phase of the trial. We conclude Spears has failed to show that the trial court's rulings led to a miscarriage of justice, even if we assume for purposes of argument only those rulings were in error. (See *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783.)

B. Jury Instruction on False Imprisonment

Spears contends the trial court erred in its instructions to the jury on the elements of a false imprisonment claim. Specifically, she contends the trial court erred in denying her request to define an appreciable period of time and to modify the instruction to inform the jury that false imprisonment may occur even if the initial detention was lawful.

1. Additional Background

The trial court instructed the jury that to establish the tort of false imprisonment, Spears was required to establish:

“One, that defendant, Steven Berchenko, intentionally deprived plaintiff of her freedom of movement by use of physical barriers, force, threats of force, or unreasonable duress. [¶] Two, that plaintiff did not consent. [¶] Three, that the confinement lasted an appreciable . . . period of time. [¶] Four, that plaintiff was actually harmed. [¶] And five, that defendant’s conduct was a substantial factor in causing plaintiff’s harm. [¶] The appropriate amount of compensation for any such harm is an issue to be decided later.”

Spears’s counsel requested that the jury be instructed that an appreciable period of time need not be hours and might be as little as 15 minutes. The trial court denied the request. However, the trial court instructed the jury, “A[n] appreciable period of time is one that is not trivial or fleeting, but it need not be a long period of time.”

The trial court further instructed the jury, “If an employer reasonably deprives an employee of freedom of movement during working hours for reasonable business purposes by use of normal employer authority over an employee, that is not false imprisonment. Spears contends that “[i]n a brief which apparently did not get filed,” Spears’s counsel proposed to further instruct the jury, “If you find that after entering the bathroom [plaintiff] was held against her will by use of threat, force or physical barrier for an appreciable length of time, that is false imprisonment.”

2. *Standard of Review*

“The propriety of jury instructions is a question of law that we review de novo. [Citation.]” (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) “When a party challenges a particular jury instruction as being incorrect or incomplete, ‘we evaluate the instructions given as a whole, not in isolation.’ [Citation.]” (*Ibid.*)

3. *Analysis*

Spears argues that under the instructions given, the jury could have believed that so long as the holding of plaintiff began with a legitimate purpose it was legitimate to continue to hold her against her will. However, as Spears concedes, her counsel did not request any modification or amendment of the instructions to clarify that point. Counsel’s failure to do so forfeited the issue: “[A] jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver. [Citation.]” (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 760.)

To the extent Spears contends on appeal that the trial court erred in refusing to instruct the jury with her proposed pinpoint instruction on the definition of an appreciable time, Spears has failed to support that contention with any argument or citation to authority. We therefore deem the issue forfeited on appeal. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

C. Denial of Motion for Leave to Amend Complaint

Spears contends the trial court erred by denying her motion for leave to amend her complaint to add a cause of action for sexual harassment.

On December 13, 2005, Spears filed a motion for leave to file a first amended complaint to add a cause of action for sexual harassment. Defendants opposed the motion on the grounds that (1) this court's opinion in the prior appeal established as law of the case that the allegations of the proposed first amended complaint did not state a cause of action for sexual harassment; and (2) the motion did not comply with the procedural requirements of Code of Civil Procedure section 1008, subdivision (b), and California Rules of Court, former rule 327.²

The trial court denied the motion.

1. Standard of Review

The trial court has sound discretion to grant leave to amend a complaint, and we review the denial of a motion to amend a complaint for abuse of discretion. (Code Civ. Proc., § 473, subd. (a)(1); *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

² California Rules of Court, former rule 327, was renumbered to rule 3.1234 effective January 1, 2007.

2. Analysis

Spears asserts that the Supreme Court's opinion in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*)³ changed the law to allow a sexual harassment claim in the absence of specific notice to the employer. However, we do not find *Yanowitz* relevant or helpful to Spears's position. *Yanowitz* involved a cause of action under Government Code section 12940, subdivision (h) for unlawful employment practices based on retaliation for the plaintiff's refusal to comply with a discriminatory order. The *Yanowitz* court held that for an employee to have opposed a practice forbidden by that statute, the employee need not "have told her employer explicitly and directly that she believes an order is discriminatory." (*Yanowitz, supra*, at p. 1046.) The court further held, however, "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination. [Citations.]" (*Ibid.*) Spears did not allege that she made her employer aware, either directly or by inference, that she believed Berkowitz's conduct was discriminatory, and thus, *Yanowitz* does not help her position.

Moreover, the material allegations of the proposed amended complaint do not differ substantially from those of the proposed amended complaint we addressed in the

³ Spears incorrectly asserts that *Yanowitz* was decided while her prior appeal was pending. However, we filed our opinion in E035083 on April 19, 2005, and the remittitur issued on June 24, 2005. The Supreme Court issued its opinion in *Yanowitz* on August 11, 2005.

first appeal. We therefore find no abuse of discretion in the trial court's ruling denying Spears's motion for leave to amend.

D. Rulings on Motions in Limine

Spears contends the trial court erred in other rulings on motions in limine.

1. Modification of Ruling After Opening Statements

Spears contends that after counsel gave their opening statements, the trial court changed its prior ruling and then allowed Spears to present evidence of damages up to one year after the bathroom incident. Spears argues, without citation to any authority, that "The omission of an entire year's facts from the opening statement prevent[ed] Spears from giving the jury a complete framework from which to evaluate the testimony and evidence it subsequently hear[d]."

However, in his opening statement, Spears's counsel extensively commented on Spears's damages, including that she had been "totally devastated" by the bathroom incident, that she had "cried and cried and she was upset" at home after the incident, that "the next morning, crying and in tears and choked up and so forth, she went to the emergency," where she received treatment, she went to the emergency room again, and "then they gave her medication for anxiety, depression, and so forth. Counsel further stated that Spears had been to her general practitioner, who was "concerned about her and rightly so," and who sent her to a psychiatrist. Counsel stated "[S]he went to [the psychiatrist] and went to him and went to him and went to him. And over a period of about a year and a half went to him probably 50 times." Counsel stated that Spears had taken a year off work and continued to visit the psychiatrist. At the end of his opening

statement, counsel summarized, “[A]fter the false imprisonment she ended up in the totality of things losing a year and a half of work over almost two years, going to a doctor psychiatrist for approximately 50 times, going to the emergency room a couple times, going to her regular doctor, taking medication on a regular basis which she is somewhat allergic to, but had to take it because of her condition to rectify the anxieties.”

Spears has not identified any additional statement about damages during the year after the incident that her counsel would have or could have made if the trial court had made its ruling earlier. Thus, Spears has failed to show that she was prejudiced in any way by the ruling.

2. Exclusion of Evidence of Prior Use of Bathrooms for Employee

Discipline

Spears contends the trial court erred by granting defendants’ motion to preclude evidence of Berchenko’s and his supervisors’ prior use of bathrooms for employee discipline. She argues that the excluded evidence would have showed that Walgreens had knowledge and notice of the inappropriate use of bathrooms and therefore ratified Berchenko’s conduct.

Walgreens’s alleged liability was based on ratification of Berchenko’s actions. Because the jury found by special verdict that Berchenko did not falsely imprison Spears, the jury was never required to determine whether Walgreens ratified his conduct. Spears has therefore failed to show that she suffered any prejudice from the disputed ruling.

3. *Exclusion of Evidence of Berchenko’s Sexual Preference*

Berchenko moved in limine to exclude evidence of his sexual preference, and the trial court ruled that Spears must eliminate all references to gender in her testimony about Berchenko on the ground that his sexual preference was “‘highly inflammable [*sic*] and prejudicial.’” Spears contends that ruling was an abuse of discretion.

Berchenko’s sexual orientation was irrelevant to any issue in Spears’s cause of action for false imprisonment. We conclude the trial court did not abuse its discretion in its ruling.

4. *Failure to Record Arguments on Motions in Limine*

Spears notes that much of the argument on motions in limine was not reported, and, without citation to authority, she contends that the failure to record that argument was “in and of itself error.” We deem the issue forfeited on appeal because Spears has failed to present argument or authority to support her contention. (*Dills v. Redwoods Associates, Ltd., supra*, 28 Cal.App.4th at p. 890, fn. 1.)

IV. DISPOSITION

The judgment is affirmed. Costs shall be awarded to Defendants and Respondents.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

GAUT

J.